

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X **Docket#**
NOVAGOLD RESOURCES INC., : 20-cv-02875-LDH-PK
Plaintiff, :
 :
- versus - : U.S. Courthouse
 : Brooklyn, New York
 :
 :
J. CAPITAL RESEARCH USA, LLC. : April 26, 2021
Defendants : 10:02 AM
-----X

TRANSCRIPT OF CIVIL CAUSE FOR TELEPHONE CONFERENCE
BEFORE THE HONORABLE PEGGY M. KUO
UNITED STATES MAGISTRATE JUDGE

A P P E A R A N C E S:

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1 THE CLERK: This is a Motion Hearing in the
2 matter of NOVAGOLD Resources Inc. v. J Capital Research
3 USA, LLC. Magistrate Judge Peggy Kuo presiding. Docket
4 number 20-cv-2875.

5 Will the parties please state their
6 appearances, starting with plaintiffs?

7 MR. RUBENSTEIN: Good morning, your Honor.

8 Jonathan Rubenstein from Baker Botts here on
9 behalf of plaintiff, NOVAGOLD Resources Inc., and with me
10 is my colleague, Jordan Kazlow and Ms. Kazlow will be
11 arguing for us today.

12 THE COURT: Good morning.

13 MR. KORZENIK: And good morning, your Honor.

14 This is David Korzenik appearing with Miller
15 Korzenik Sommers Rayman, appearing on behalf of defendant
16 J. Capital Research and with me my partner, Terence
17 Keegan.

18 THE COURT: All right. Good morning, everyone.

19 So my understanding is that there is a dispute
20 as to whether further discovery should be stayed and then
21 there is an issue of an assertion of a reporters'
22 privilege by a defendant.

23 So why don't we start with the issue of the
24 stay? Why don't we start with the plaintiff because I
25 would like to hear what further discovery you'll be

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1 seeking that will inform my decision. Go ahead. Ms.
2 Kazlow?

3 MS. KAZLOW: Your Honor, the issue of the stay,
4 J Cap has framed it as an issue of further discovery but
5 it's really an issue of the discovery that we have
6 currently asked for pursuant to your Honor's order in
7 September that discovery proceeds on certain topics that
8 we discussed at the initial conference in September and
9 NOVAGOLD issued discovery requests to J Cap pursuant to
10 your Honor's order and J Cap has really refused to
11 participate in the discovery process on a couple of
12 different grounds and one of them is this assertion that
13 the anti-SLAPP statute enacted after this case started
14 has some bear -- the stay in that statute has some
15 bearing on this dispute.

16 And now J Cap made one production of four
17 documents on Friday which is one business day before this
18 dispute and other than that, has not stated that they are
19 currently collecting documents, searching for documents,
20 reviewing documents or have any intention of providing
21 further documents. Indeed, before last Friday, in
22 discovery meet and confers, they had suggested that they
23 would not be producing any documents before the Court's
24 ruling on their motion to dismiss.

25 And we really think this is inappropriate for a

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1 couple of reasons. The first is an issue of
2 retroactivity and as I mentioned, this statute that
3 they're relying on is an anti-SLAPP statute that was
4 enacted by the New York Legislature in November of 2020.
5 We filed our dispute in June of 2020, several months
6 before the enactment of this statute and there is a
7 strong presumption against retroactivity in New York and
8 there's been no showing here that this statute should
9 retroactively apply.

10 There's first, a statute to retroactively
11 apply, there needs to be some implication express or
12 otherwise that the statute is to apply retroactively and
13 that's not the case here. There's some legislative
14 history that the defendants have referred to in other
15 motions and immediately enactment but in the Court of
16 Appeals of *Majewski v. --* a New York Court of Appeals
17 case of *Majewski v. Broadalbin-Perth Central School*
18 *District*, the Court made clear that that's just simply
19 not sufficient to overcome the presumption against
20 retroactivity and there's, you know -- I think it's
21 really hard to argue in this case that the statute was
22 intended to have some sort of immediate remedial effect
23 where the previous version of the anti-SLAPP statute had
24 been on the books for nearly 30 years and had been
25 applied narrowly by the Courts for that entire time

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1 without the legislature acting to correct it.

2 And then second, to this particular dispute,
3 there's even further reason why the anti-SLAPP statute
4 shouldn't apply because this is a discovery dispute and
5 the provision that they're seeking to enact here is a --
6 that they're seeking to apply here is a stay of discovery
7 and the Second Circuit made clear just this last summer
8 that state anti-SLAPP provisions and complexes of the
9 Federal Rules of Civil Procedure and procedural
10 provisions of the state anti-SLAPP statutes do not apply
11 to federal courts that are sitting in diversity.

12 And so for those reasons, it's really -- it's
13 inappropriate to apply it to further discovery and it's
14 inappropriate that they're applying it to refuse to
15 answer any discovery pending the motion to dismiss here,
16 specifically where we already had a hearing on whether or
17 not discovery should be stayed pending a ruling on the
18 motion to dismiss and your Honor denied that motion.

19 THE COURT: All right. Is that all, Ms.
20 Kazlow?

21 MS. KAZLOW: That's all, your Honor --

22 THE COURT: Okay.

23 MS. KAZLOW: -- on the anti-SLAPP issue.

24 THE COURT: Yes. All right. Can you delineate
25 a little bit more what discovery you have not received?

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1 MS. KAZLOW: Yes, your Honor. So we have not
2 received discovery in response to any of our requests for
3 production until this last Friday when J Cap produced
4 four documents that were publicly available news
5 articles, I believe and technical reports related to the
6 project.

7 Their specific requests -- so it is our entire
8 request for production that they are resisting on the
9 basis of this and the reporters' privilege. There are
10 specific requests that I can go into that relate to both
11 the anti-SLAPP and the reporters' privilege but the
12 requests in general cover a wide range of topics, the
13 sources that NOVAGOLD considered in or that J Cap
14 considered in its decision to target NOVAGOLD, the
15 funding that J Cap received, the research that J Cap may
16 or may not have performed in deciding to write this
17 report, information relating to J Cap's investment in
18 NOVAGOLD securities and information relating to J Cap's
19 investment in other securities in the mining industry,
20 information related to J Cap's editorial process and who
21 had editorial control and who had editorial control and
22 their independence.

23 Like I said, it's every one of our RFPs that
24 they have refused to respond to and the interrogatories,
25 they've given some responses to but there's information

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1 they're withholding both on the basis of anti-SLAPP and
2 the reporters' privilege.

3 THE COURT: All right. Thank you.

4 So Mr. Korzenik or Mr. Keegan, can you address
5 the anti-SLAPP issue first and then we can talk about the
6 reporters' privilege?

7 MR. KORZENIK: Yes, let me first say so that
8 this conference can be productive, is that the
9 description of our discovery responses is utterly
10 misleading and the description or the characterization of
11 our position legally is also an utter mischaracterization
12 of what we're doing.

13 Your Honor did order some initial discovery and
14 we responded very openly and forthrightly in the
15 interrogatories and in the document responses to those
16 questions and we are producing documents in the same
17 manner that the other side is. The other side has
18 produced only their public -- largely their public press
19 releases to us and they've produced very little else.
20 They say that they're doing rolling discovery and so are
21 we.

22 We have not declined to provide answers to the
23 interrogatories. The answers to the interrogatories were
24 very forthright and direct and they were intended to
25 clear away a lot of the mystery that the plaintiffs,

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1 either imagine or feel or see around the issues here.

2 We explained and identified the people how we
3 chose to write about NOVAGOLD and we explained what our
4 source materials were and we identified them. We asked
5 plaintiff's counsel, do you really want -- all of the
6 documents that we used, all of the supporting materials
7 that we used in creating this report were the publicly
8 available filings and documents that NOVAGOLD put out.
9 The report does not pretend to rely on anything outside
10 of that and we asked in our meet and confer, do you
11 really want us to print out all of those materials and
12 they said oh, no, you can just provide a list.

13 In the interrogatories, we identify them and
14 then we decided, you know, these guys are going to say
15 that we didn't produce anything if we give them a list,
16 so we decided we'd start to produce those documents that
17 we relied on and we're going to do that.

18 The key thing about this report is that it's
19 based on a set of documents that are identified J Capital
20 Research report about NOVAGOLD which is called "Pipe
21 Dreams". So when I referenced Pipe Dreams, that's the
22 name of the report.

23 So we are providing every single one of the
24 documents on which the report was predicated and on which
25 it was based. So for them to say that we're not doing

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1 that is disingenuous at best.

2 The other thing is they say well, who -- what
3 were our positions on what did J Cap ask specifically,
4 did we have any -- you know, what was our short positions
5 on this NOVAGOLD stock and the two people who actually
6 primarily wrote the report, we identified the other
7 people who had some potential input and we -- those two
8 people are Anne Stevenson-Yang and Tim Murray and both of
9 them were previously journalists and they run this
10 operation as journalists and they keep editorial control
11 over it. That's their profession and that's their
12 approach. Anne Stevenson-Yang was a Gannett reporter for
13 a newspaper for many years before she chose to publish
14 more financial-based articles but we disclosed who those
15 people were and we also disclosed and explained in detail
16 why it is that she chose NOVAGOLD as the subject of the
17 report and how she brought her view about it, her
18 suggestion to Tim Murray, who had experience in mining --
19 in writing about mining and knew about it and that's how
20 they chose to do it and there's more detail about it in
21 the report.

22 And then they asked, well did people -- what
23 was J Capital Research's investment position in NOVAGOLD,
24 either short, long or whatever and the answers is that
25 there was none. They didn't have any through their

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1 family, they didn't have any personally, they didn't have
2 any through their company, they didn't have any through
3 any company that they owned or controlled.

4 There are subscribers and others who received
5 the report but as to the question about their investment,
6 we answered that. So for them to say that we didn't
7 provide information or documents that don't exist is a
8 complete misrepresentation of what it is that's going on
9 here.

10 So the answer is that if -- and we'll be glad
11 to provide our interrogatory answers. I would say that
12 we tried to make them -- I would say they're more open
13 and forthcoming than most interrogatory answers by most
14 lawyers and the purpose was to answer the questions that
15 your Honor put forth and the purpose was to remove the
16 mystery so that we wouldn't be spending time searching
17 for documents that don't exist and so we tried to
18 identify what exists and what doesn't exist in the
19 answers to the interrogatories.

20 What really does remain are issues about
21 privilege. They say they they're going to be providing
22 answers to our document requests and interrogatories and
23 that that's going to be rolling. The only thing they've
24 given us largely are their press releases and maybe a few
25 other things. We trust that they're going to honor that.

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1 That they're asserting privilege, attorney-client
2 privilege as to the attorney's fees that they think that
3 they've told Judge DeArcy Hall was the life blood of
4 their trade libel claim. In other words without that,
5 their trade libel claim doesn't exist.

6 So I don't know what I am supposed to do about
7 this but Judge DeArcy Hall told them well look, I'm kind
8 of skeptical about your damages pleadings and I don't
9 think you've pled enough to survive the motion that they
10 planned to make, so I am going to let you amend your
11 pleadings on that issue and they did and they said oh,
12 our special damages are our attorney's fees in bringing
13 this action and then preparing our response or PR
14 response. We then made our motion and that pending
15 motion, one of the issues relates to that.

16 So they -- and they now when we ask for the
17 documents that relate to it, they say oh, attorney-client
18 privilege, well, if we are blocked by an attorney-client
19 privilege, if they're going to redact their billing
20 statements and their communications with their client,
21 well then how are we going to be able to determine
22 whether those legal activities that we're being charged
23 for relate to acceptable range of damage -- acceptable
24 damages, you know, cause damages, or whether they're not.
25 Well, we can't do that.

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1 THE COURT: Okay.

2 MR. KORZENIK: So the motion sub judice --

3 THE COURT: Mr. Korzenik --

4 MR. KORZENIK: -- right now -- okay, so that's
5 my --

6 THE COURT: Mr. Korzenik, you've gone --

7 MR. KORZENIK: -- thoughts on this
8 (indiscernible) --

9 THE COURT: -- really far afield from the issue
10 that I wanted you to talk about. So the first question
11 was --

12 MR. KORZENIK: Okay, so retroactivity.

13 THE COURT: -- about the stay -- well, it's
14 about -- you've said that your position was
15 mischaracterized.

16 MR. KORZENIK: Yes.

17 THE COURT: My understanding of the way
18 plaintiff has framed the issue is that he defendant is
19 invoking the anti-SLAPP law to say that there should be
20 no discovery. Is that, in fact, what you're doing?

21 MR. KORZENIK: We do think the stay is
22 important but not for that purpose because we've already
23 responded to discovery requests that were responsive or
24 that arose from your Honor's ruling.

25 So for them to say that we are using the stay

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1 in order to block discovery or to -- you know, that's
2 simply false.

3 THE COURT: Okay.

4 MR. KORZENIK: We --

5 THE COURT: That's what I wanted to -- that's
6 what I thought I heard you say and I wanted to get that
7 clarified.

8 MR. KORZENIK: Okay.

9 THE COURT: So in fact, you're not arguing that
10 the anti-SLAPP law is dispositive here in closing the
11 door on discovery at this moment.

12 MR. KORZENIK: No, but what it does do is we
13 believe that it should bar and be a factor that your
14 Honor should consider as to any further discovery that we
15 might be required to make. And I'll just address the
16 retroactivity issue to this extent.

17 The anti-SLAPP has import really more for Judge
18 DeArcy Hall's motion to dismiss because it imposes an
19 actual malice standard on their pleading that they
20 thought they didn't have. They claimed they were private
21 figures but the anti-SLAPP now imposes that standard on
22 both public and private figures but that's not this issue
23 for your Honor.

24 THE COURT: Right. And then --

25 MR. KORZENIK: There's also (indiscernible) --

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1 THE COURT: Are you saying --

2 MR. KORZENIK: Well, there's also --

3 THE COURT: There's also what?

4 MR. KORZENIK: Yes. Oh, no. So on the anti-
5 SLAPP, so we're saying that as a matter of policy, it
6 should have bearing on whether your Honor directs any
7 further discovery from us.

8 THE COURT: Right.

9 MR. KORZENIK: And it also should affect the
10 way in which your Honor views discovery sought that may
11 also be privileged and that we think is privileged.

12 THE COURT: All right. So but the issue
13 because I understand that the provision of the anti-SLAPP
14 law that you're evoking is a procedural one and it's a
15 state law and there's a general proposition that state
16 procedure shouldn't apply in federal court in diversity
17 cases and so unless the Second Circuit has said for sure
18 that this provision applies here, it's not that clear
19 that there's an actual bar and so what I have heard you
20 say is a little bit to the side of that issue that as a
21 matter of policy, we should not go forward with
22 discovery, not that there's an actual bar that's
23 controlling where the parties cannot go forward with
24 discovery, it's more that they should not. Is that
25 right?

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1 MR. KORZENIK: I think that's generally correct
2 but I would like to just refine that in two ways. So the
3 first one the anti-SLAPP substantive provisions do apply
4 in federal court and they do reply retroactively. So all
5 of the --

6 THE COURT: Right. So we're not talking about
7 that when we talk about discovery.

8 MR. KORZENIK: Correct. Correct.

9 THE COURT: All right. So I am just --

10 MR. KORZENIK: But what --

11 THE COURT: -- focused on discovery.

12 MR. KORZENIK: -- my adversary was arguing that
13 the retroactivity makes it a moot point and that's simply
14 not true because the anti-SLAPP applies retroactively
15 according to the four rulings so far.

16 THE COURT: The substantive (indiscernible).

17 MR. KORZENIK: But the substantive part. But
18 the policy part is important in two respects; one, the
19 Second Circuit has in any event in libel cases, follow
20 that same policy even before the anti-SLAPP was enacted,
21 so that in the Bireau (ph.) case for example, and
22 elsewhere, the Second Circuit made clear that it was
23 concerned about the impact of discovery costs on speech
24 and the chilling effect that that kind of cost that a
25 plaintiff can impose on a defendant speaker and

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1 therefore, they both expressed the desire to allow these
2 actions to be subject to early dispositive motions and
3 two, to confine discovery in a way that protects these
4 figures from undo cost.

5 So the thing that concerns us most here is that
6 a lot of the discovery or any further discovery than what
7 we've provided is going to cost tremendous amounts and
8 what we're also concerned is they've challenged some 20-
9 plus -- they say 100 but the ones that they've identified
10 are in the range of 20, false statements. We've said
11 those are opinions. Judge DeArcy Hall is going to decide
12 that either all of them --

13 THE COURT: Yes.

14 MR. KORZENIK: -- or some of them are matters
15 of opinion --

16 THE COURT: Okay.

17 MR. KORZENIK: And why should we be paying for
18 discovery --

19 THE COURT: Mr. Korzenik --

20 MR. KORZENIK: -- on items that are not
21 actionable --

22 THE COURT: All right, Mr. Korzenik --

23 MR. KORZENIK: -- and that's why I --

24 THE COURT: Look --

25 MR. KORZENIK: -- think (indiscernible) --

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1 THE COURT: -- I'm sorry to cut you off but we
2 --

3 MR. KORZENIK: Yeah, so that's why we -- that's
4 okay.

5 THE COURT: Yeah, we don't have unlimited time
6 this morning, so I really just want to focus on the
7 decisions that I have to make.

8 MR. KORZENIK: Fair enough.

9 THE COURT: All right. So let me go back to
10 Ms. Kazlow because I just want to clarify, there seems to
11 be two different things. One is the limited discovery
12 that I authorized in September and the other is moving
13 forward with further discovery.

14 Ms. Kazlow, are you saying that the limited
15 discovery has not really taken place fully, that there
16 are issues there? I think I hear you say that. Are you
17 also saying that you want to expand the limited discovery
18 I authorized to include further discovery moving forward?

19 MS. KAZLOW: Your Honor, the issue here is
20 really with the limited discovery that you already
21 authorized and the responses --

22 THE COURT: Okay.

23 MS. KAZLOW: -- that (indiscernible) to this
24 time.

25 THE COURT: Okay.

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1 MS. KAZLOW: And if --

2 THE COURT: So let me pause there. So you're
3 not, in fact, saying you want to expand the discovery.
4 So this whole issue about the anti-SLAPP law and the
5 policy not allowing full discovery in the early stages,
6 it doesn't sound like that's really relevant here because
7 you're not arguing to expand discovery at this point; is
8 that right?

9 MS. KAZLOW: Right and I'm concerned about --
10 I'm not sure that I understand what Mr. Korzenik means
11 when he's objecting to further discovery and whether he
12 is objecting to NOVAGOLD bringing further requests which
13 it has not yet brought and we can take up this issue at
14 that time, although we still believe that the anti-SLAPP
15 stay wouldn't apply in this federal case or whether he
16 means further discovery in that he's discussing J Cap's
17 obligation to further respond more fully to the discovery
18 NOVAGOLD has already requested.

19 THE COURT: Exactly. And that's why I am
20 asking the question. So what I hear you say Ms. Kazlow
21 is that the plaintiff is not seeking to expand the
22 discovery beyond what was authorized in September but you
23 do have issues with defendant's compliance with what has
24 been propounded, right --

25 MS. KAZLOW: That's right, Judge.

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1 THE COURT: -- I just want to get that issue
2 clear. Okay, good. So then this whole issue about
3 expansion of the discovery and the anti-SLAPP law I think
4 is really not relevant at this point because we're still
5 talking about my order from September and I'm not
6 inclined to revisit that or to narrow it any further
7 based on any issues of the anti-SLAPP law because my
8 reading of our discovery in September is that I limit it
9 -- I authorized only very limited discovery in the first
10 place and so let's focus on that discovery and whether it
11 has happened.

12 So what I hear Ms. Kazlow you say is that there
13 have been issues in terms of the defendant complying.
14 You said that they only made a production on Friday of
15 four documents and I hear Mr. Korzenik say that is in
16 fact all we have or all that we are obligated to produce,
17 Mr. Korzenik.

18 MR. KORZENIK: No, no, I didn't say that.

19 THE COURT: No.

20 MR. KORZENIK: So we still think that there are
21 more things --

22 THE COURT: I'm asking the question -- Mr.
23 Korzenik, I'm not saying what -- I'm asking you the
24 question. So --

25 MR. KORZENIK: Okay, go ahead.

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1 THE COURT: So which one is it. Okay?

2 MR. KORZENIK: The answer is we do not consider
3 that production to be the end of what we intend to
4 produce --

5 THE COURT: Okay.

6 MR. KORZENIK: -- in response to the limited
7 discovery that your Honor ordered.

8 THE COURT: Great. So when will you get the
9 remaining discovery to the plaintiff?

10 MR. KORZENIK: Well, the issue is this. As to
11 disclosing all of the documents on which we base the
12 report which is really, you know -- that we had asked the
13 plaintiffs, I said do you really want us to actually
14 produce that physically? I said are you really --
15 because those documents that we base the report on are
16 your client's own documents and they said oh, no, you
17 don't have to do that just list them.

18 Well, we say well, we'd like to list them but
19 you -- obviously we need to Bates stamp them so that we
20 can use them in other proceedings but they said that
21 would suffice but then when they came forward and said
22 that we hadn't produced anything, I just was kind of
23 surprised by that, so that we decided --

24 THE COURT: Okay.

25 MR. KORZENIK: -- all right, we'll start to

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1 produce these documents that they told us we didn't have
2 to produce but I am going to do it anyway --

3 THE COURT: All right.

4 MR. KORZENIK: -- because --

5 THE COURT: Let me pause here.

6 MR. KORZENIK: -- I've got to Bates stamp them.
7 Yeah.

8 THE COURT: Mr. Korzenik, let me pause here.
9 It seems like there's a communication gap based on what
10 you're saying, all right? So when you get a request for
11 production the responses are either here they are or we
12 think we should have to produce them and then you state
13 the grounds for it or we don't have them, right?

14 MR. KORZENIK: Right.

15 THE COURT: So I am a little bit unsure based
16 on how you describe it, what exactly happened because you
17 said your response was we have them but do you really
18 want us to produce them and they said no, we just want a
19 list and that you produced the list and then they came
20 back and said where are the documents. Is that accurate?

21 MR. KORZENIK: No, they didn't --

22 MR. KEEGAN: Your Honor?

23 MR. KORZENIK: -- do that in their --

24 THE COURT: Well, let me finish with Mr.
25 Korzenik.

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1 Go ahead. Just be clear because I am confused.
2 I wasn't there and I don't -- I didn't go into any great
3 detail in your responses --

4 MR. KORZENIK: No, we -- at first no, in their
5 letter, they made it seem as if we weren't producing
6 those materials --

7 THE COURT: Okay.

8 MR. KORZENIK: -- and we weren't because we
9 were going to give them a list and the list --

10 THE COURT: Right.

11 MR. KORZENIK: -- is already manifestly present
12 in the report because the report --

13 THE COURT: Right.

14 MR. KORZENIK: -- lists all of the documents on
15 which it was based.

16 THE COURT: Okay.

17 MR. KORZENIK: But we decided when they wrote
18 in their letter that we hadn't produced any documents, we
19 said all right, they told us we could give them a list
20 but we're not going to do that because they're making us
21 look bad in front of your Honor and so we are going to
22 roll out those things. We're going to give them the full
23 set. We've got to Bates stamp them anyway, so we're
24 going to do that and we're going to --

25 MR. KEEGAN: But your Honor --

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1 THE COURT: Well, actually -- so hold on. Wait
2 a second. It sounds like when I gave you the option,
3 there was a fourth option which I neglected which is we
4 haven't given it to you yet and so that sounds like what
5 you're saying.

6 MR. KORZENIK: Correct.

7 THE COURT: Is that right, Mr. Korzenik?

8 MR. KORZENIK: Correct.

9 THE COURT: Okay. So Mr. Rubenstein, I heard
10 you say -- tried to interrupt in the background. What
11 are you trying to say?

12 MR. KEEGAN: No, your Honor, that was Terrence
13 Keegan.

14 THE COURT: Okay. Mr. Keegan, you were
15 interrupting your cocounsel?

16 MR. KORZENIK: He can.

17 MR. KEEGAN: No, no, not at all, your Honor.
18 And I didn't mean to cut anybody off. I just wanted to
19 clarify what we had produced and the nature of our
20 production. Just like NOVAGOLD, we are identifying
21 documents. We had identified -- we have categories of
22 documents that we would produce in our responses to their
23 requests for production and as we evaluate those
24 documents, then we are producing them. We did produce
25 documents on Friday.

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1 Ms. Kazlow did say that there are four
2 documents. It's over 900 pages of material that we
3 produced on Friday. So that does take time to evaluate,
4 just as we acknowledge it takes times for NOVAGOLD to
5 evaluate documents as well.

6 I believe we had produced from a quantitative
7 stand point more documents than we had received from
8 NOVAGOLD already. And so yes, we're continuing to
9 evaluate the materials that J Capital used to -- in its
10 report. That takes time. We'll continue to evaluate
11 them and produce them as we're ready to do so.

12 MS. KAZLOW: Your Honor?

13 MR. KEEGAN: That's just what I wanted to
14 clarify.

15 THE COURT: Okay. So Mr. Keegan, since you
16 jumped in, why has it taken so long to respond?

17 MR. KEEGAN: It's again, the correspondence
18 that we had in the meet and confers that we had. As Mr.
19 Korzenik said, we did suggest, we could provide a list of
20 the documents that we used to -- in the report.
21 Initially, that was the way that we thought we were going
22 to go.

23 Instead, given the joint letter before your
24 Honor and with this conference pending, we've decided
25 it's better to produce the documents themselves and

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1 (indiscernible).

2 THE COURT: When was the list produced?

3 MR. KEEGAN: No, instead of producing the list,
4 we are producing the actual documents.

5 THE COURT: So you never produced the list?

6 MR. KEEGAN: We did not produce the list.

7 MR. KORZENIK: Well, they had the list.

8 MR. KEEGAN: We suggested production of the
9 list in our meet and confers and --

10 THE COURT: And you were told that that list
11 was okay or not okay?

12 MR. KEEGAN: We were told the list was going to
13 be okay but then the joint letter goes in and it appears
14 after the joint letter that, you know, the list is not
15 going to suffice and so that's why we even said
16 (indiscernible) --

17 THE COURT: When was the agreement --

18 MR. KEEGAN: -- produce this document.

19 THE COURT: When did you think you had an
20 agreement that the list was okay?

21 MR. KORZENIK: I think in our first meet and
22 confer. There were two. I don't remember the date.
23 Jordan, do you remember?

24 MS. KAZLOW: It was March 9th. And your Honor,
25 if I may, there's been some mischaracterization here of

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1 the issue and there's kind of really a twofold problem
2 with the way that J Cap's characterizing the issue here.
3 The first is that they really zeroed in on as though our
4 request for the documents that they relied on is the only
5 one of our requests. We've made 15 requests for
6 production and this is just one of them and they haven't
7 responded to any of the others.

8 And then with that, what they're representing
9 here today is that they've told us all they've relied on
10 is the publicly available documents and that they'll give
11 us them and it's true that they say -- you know, they
12 said do we really need to give you the publicly available
13 documents and in an effort to compromise, we said if you
14 can give us a list of them, we don't need you to print
15 them out for us, we can print them out in an effort to
16 compromise.

17 But the issue is that that's not -- they have
18 not made a statement until this call today that that is
19 the total of the list. They've got catchalls all over
20 their responses that say that, you know, to the extent
21 there's any of -- they list the document and it's not a
22 catchall that to the extent there are any other
23 documents, we're objecting on the basis of paragraphs 1,
24 2, 3, 4, 5, 6, 7 of their objections.

25 And then the other issue is that this today is

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1 really the first that we've heard of a rolling
2 production. We asked Mr. Korzenik on our March 18th, I
3 believe, call, I asked, you know, are you've raised all
4 these other objections and I understand that you have
5 these reporters' privilege objections to our discovery
6 requests but barring those objections, would you be
7 willing to produce documents now or are you standing on
8 your anti-SLAPP objection? And he just kept repeating
9 that there's a timing issue and that he was going to be
10 standing on his anti-SLAPP objection.

11 I think if we had come to an agreement on a
12 rolling production prior to this discovery conference
13 today, we could have saved your Honor 45 minutes perhaps
14 but this is really just --

15 THE COURT: Or longer.

16 MS. KAZLOW: -- this is the first we're hearing
17 of it. So you know, we were concerned --

18 MR. KORZENIK: That's false.

19 MS. KAZLOW: -- that we were going to come to
20 your Honor --

21 MR. KORZENIK: That's not true but
22 (indiscernible).

23 MS. KAZLOW: And we were concerned that we were
24 going to come to your Honor and we're going to bring
25 these reporters' privilege issues and we're going to work

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1 through these reporters' privilege issues with your Honor
2 and then we turn around and two days later they say okay,
3 reporters privilege is resolved but we're not going to
4 give you this stuff because of anti-SLAPP and so we
5 needed to bring them together, so that when we got the
6 relief on one, we received the documents from them and
7 they had made clear in discovery meet and confer, they
8 would not commit to producing documents.

9 THE COURT: All right. So --

10 MR. KORZENIK: I cannot say that that's true.

11 THE COURT: Well, no, hold on. Please don't.

12 This is -- we are going beyond where we need to be. I
13 know that you disagree with things that have been said.
14 What I am going to remark is the documents that were
15 given to me were the filing at ECF 51 includes an Exhibit
16 C that is plaintiff's first request for production of
17 debt collector and I see that it is dated October 9th,
18 2020.

19 So normally, when there is a request for
20 production of documents, the other side has 30 days to
21 respond, all right? I am hearing that there wasn't a
22 response in 30 days. I didn't see any deficiency letters
23 or discovery disputes raised until this recent letter and
24 I heard somebody say that your first meet and confer was
25 March 9th. That is of great concern to me. All right?

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1 So --

2 MS. KAZLOW: Your Honor, we sent -- your Honor,
3 NOVAGOLD first sent a letter to J Cap in January raising
4 concerns about discovery and the process was dragged out
5 from there. We wanted to --

6 THE COURT: Yes. This (indiscernible).

7 MS. KAZLOW: -- (indiscernible) confer with
8 each other.

9 THE COURT: Yes. So this is my concern is that
10 it is being dragged out, all right? And so I don't want
11 to get into the issues now because there's a lot of back
12 and forth between counsel as to whose fault it is and I
13 don't think at this point that that is particularly
14 useful because what I am seeing is that for a request for
15 production of documents that went out on October 9th and
16 for it not to be -- well, for there still to be a dispute
17 as to whether it has been fully complied with is of great
18 concern to me. So number one --

19 MR. KORZENIK: Can I address that? Can I
20 address that timing, your Honor?

21 THE COURT: Wait. Hold on. I will give you
22 five seconds to address it. Who is speaking?

23 MR. KORZENIK: David Korzenik. We responded to
24 those --

25 THE COURT: All right. Five seconds, Mr.

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1 Korzenik.

2 MR. KORZENIK: We responded on November 24th
3 and then we were in the midst of motion practice on our
4 motion to dismiss and both parties were briefing that for
5 the several months that followed in December through
6 December and into early January, I believe. So we were
7 occupied --

8 THE COURT: All right.

9 MR. KORZENIK: -- with the motions to dismiss.
10 Then when those were done and raised, we turned to
11 speaking with other -- each other again about the
12 discovery but we responded on November 24th with our
13 answers to the interrogatories.

14 THE COURT: All right.

15 MR. KORZENIK: And we responded on November
16 24th with our answers to the --

17 THE COURT: I see -- I see the responses to the
18 interrogatories, nobody attached any responses to the
19 production of documents. All right, so --

20 MR. KORZENIK: We can provide those --

21 MR. KEEGAN: We did do that. We did provide
22 that, your Honor.

23 THE COURT: All right.

24 MR. KEEGAN: That was also on the same day. We
25 had a response to the request for production.

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1 THE COURT: Okay. I'm just looking at what was
2 filed with me and it was a joint filing, so if you wanted
3 me to see that, then somebody should've filed it but in
4 any event, this is what I am seeing and now I've heard
5 what you've said about the response.

6 So whatever those responses were and the
7 problems there are issues that you still need to talk
8 about and what you've said to me about whether the
9 documents themselves need to be produced or whether a
10 list is sufficient, are things that you need to continue
11 to meet and confer, so that you can be clear on what you
12 need and what you don't need.

13 The point is not to inflict the same amount of
14 work on each side. I heard someone say well, we produced
15 more than they did. That's not really the relevant
16 issue. The issue is that both sides get what they're
17 entitled to and what they need to move this litigation
18 forward, all right? But you should be clear and work
19 with each other in an efficient way to produce what you
20 need and only what you need. So if the 900 pages of
21 documents are publicly available and you can get it
22 yourself, you should have a discussion about whether
23 that's sufficient, all right? And not jump to
24 conclusions about how bad it makes you look in front of
25 me. I don't care, right?

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1 I want the parties to get what you need and if
2 you get it, however you do, if you agree on it, that's
3 great. That is the thing that impresses me the most is
4 that you can come to an agreement that is efficient and
5 effective pursuant to Rule 1 of the Federal Rules of
6 Civil Procedure which is that there should be speedy,
7 just and inexpensive resolution of these issues.

8 So if you can come to an agreement, that's the
9 best thing. If you can't, then you need to put forward
10 to me in a very clear way what the problem is. Now the
11 letter that was filed was not entirely clear to me
12 because there was a lot of discussion about the scope of
13 discovery. I read it and perhaps I misread it to mean
14 that the plaintiffs were seeking an expansion of the
15 discovery that I authorized in September. I'm hearing
16 today, in fact, it's not. You're just having ongoing
17 discovery disputes about the discovery that has already
18 been authorized.

19 So in order to -- and the two issues were --
20 well, I am not sure that anti-SLAPP plays into this at
21 all. Maybe one of the issues was that there was an
22 attempt to constrict even the limited discovery that I
23 authorized in light of anti-SLAPP and I will say to that
24 point, that I am not doing that. It should go forward
25 the way it was authorized in September.

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1 And then the second issue was that there seemed
2 to be two issues, one is has defendant complied and
3 produced fully or are there outstanding issues and one
4 piece of that is this reporters' privilege issue.

5 So we haven't even gotten to the reporters'
6 privilege and we've run out of time because I heard some
7 other people call in for my next conference. So I will
8 say that my reading of the -- on the issue of reporters'
9 privilege is that there needs to be a lot -- the
10 requesting party has a burden to state more clearly what
11 they're seeking and how they can't get it somewhere else,
12 right? So they have the burden.

13 And so Ms. Kazlow, if you're seeking to
14 overcome the reporters' privilege, then you need to
15 present more than has currently been presented to me, if
16 that continues to be an issue. So for purposes of
17 today's --

18 MS. KAZLOW: Your Honor, I do believe that
19 that's going to continue to be an issue --

20 THE COURT: Okay.

21 MS. KAZLOW: -- and I don't know if it's
22 possible for you to provide some guidance today on the
23 scope of that privilege. J Cap is using it to assert a
24 privilege and refuse production on basically anything
25 that is not within the four corners of the report and we

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1 think that that's really an extremely over broad
2 assertion of the privilege and so even setting aside the
3 burden on a requesting party to show that nonconfidential
4 information is necessary, there's a wide swathe of
5 categories to which they've refused production that we
6 don't believe the reporters' privilege would even apply.
7 For example, who is funding their report or their
8 financial motive in the report and these are categories
9 that you expressly authorized discovery in in the limited
10 granted discovery in September. And so, I'm just afraid
11 that -- I know we're running out of time. I'm just
12 afraid that our conversations as to this won't be
13 productive without some advice perhaps on the scope of
14 this privilege.

15 THE COURT: Well so my understanding of the
16 framework of this privilege is that the plaintiff in this
17 case, the parties seeking the confidential or
18 nonconfidential news has to make a clear and specific
19 showing that the news is highly material and relevant,
20 critical or necessary to a party's claim, defense or
21 proof of a material issue and not obtainable from any
22 other source.

23 And here it says clearly that it's not the
24 nonconfidential news. So to the extent that that informs
25 the scope of what you're talking about, that seems to be

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1 the clear reading of the scope of that material. I don't
2 have before me, unless you can point it out to me, Ms.
3 Kazlow, what beyond the news it is that you're seeking
4 that is -- for which this privilege is being asserted.

5 MS. KAZLOW: Yes, so the list is kind of long
6 and I'm sorry because I know we're running out of time
7 but there's a request for production number three for
8 internal policies and procedures related to J Cap
9 selection and subject and reporting guidelines. There's
10 request number six for documents and communications
11 between J Cap and NOVAGOLD. There's a request number
12 seven for documents and communications between J Cap and
13 third persons regarding NOVAGOLD and this would expand
14 beyond just news being communicated about to, you know
15 the reasons why --

16 THE COURT: Okay.

17 MS. KAZLOW: -- (indiscernible) report.
18 There's document --

19 THE COURT: I --

20 MS. KAZLOW: Yes, your Honor?

21 THE COURT: I see. I see. And so to the
22 extent, for example, just production number three, it
23 says all internal policies and procedures related to a
24 selection of subjects for the report. I on the face of
25 it, don't see how it is news because it's outside of the

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1 news itself but if Mr. Korzenik or Mr. Keegan, you want
2 to put in a future filing, more information as to how
3 that is in fact covered by the privilege, you're welcomed
4 to do that and the parties can then brief that in greater
5 detail.

6 MR. KORZENIK: Okay.

7 THE COURT: All right?

8 MR. KORZENIK: We'll do that.

9 THE COURT: But my reading of the privilege is
10 that it covers news and the requests that Ms. Kazlow have
11 pointed out don't seem to be news on its face. There are
12 policies surrounding the handling of the reports and et
13 cetera, the production of the news, let's say, not the
14 news itself. So if the privilege applies, that -- I'm
15 open to see more briefing on the issue but on the face of
16 it, I don't see how it does. All right?

17 So that has not yet been fully briefed and I
18 will grant the parties leave to brief that issue if it
19 becomes an ongoing issue. So I want the parties to
20 confer and see if you can reach an agreement and if you
21 can't, then I will authorize there to be motions to
22 compel or for protective orders based on that provision.
23 All right?

24 MS. KAZLOW: Thank you, your Honor.

25 THE COURT: And so I think --

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1 MR. KORZENIK: Okay.

2 THE COURT: -- that's -- and then I saw at the
3 very end that J Cap has asked for leave to file a letter
4 about deficiencies that it has identified by defense --
5 by plaintiff and I think that if you can't -- I don't
6 know what those deficiencies are. There was an allusion
7 to the attorney-client privilege being asserted. So if
8 you can't work that out, then I will also permit you to
9 brief that issue and file a motion for a protective order
10 or to compel based on that limited issue or those limited
11 issues -- I mean, I don't -- again, I don't know the
12 scope of the deficiencies you're talking about, so I
13 guess what I will do is I'll permit -- I'll grant
14 defendant leave to file letters setting forth those
15 deficiencies and then we can have another phone
16 conversation about what those deficiencies are and if we
17 identify any that require further briefing, then I may
18 authorize it at that point but I think maybe the first
19 interim step will be that the defendant can file a letter
20 setting forth the deficiencies only after you have tried
21 to resolve them with the plaintiff.

22 MS. KAZLOW: Your Honor, may I ask just one
23 clarifying question.

24 THE COURT: All right. Ms. Kazlow? Yes.

25 MS. KAZLOW: So for the attorney-client

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1 privilege issue, if we're not able to sort it out, you've
2 requested a letter. Am I understanding correctly that if
3 we're not able -- we'll first try to sort out of the
4 reporters' privilege issue between ourselves but if we're
5 not able to sort those out, your Honor is permitting full
6 briefing on that issue in the form of a motion to compel
7 --

8 THE COURT: Right.

9 MS. KAZLOW: -- or protection. Okay.
10 Understood. Thank you, your Honor.

11 THE COURT: Yes, because that issue has been
12 identified and I think it's a discrete enough issue that
13 the further legal arguments will be helpful to the Court.
14 All right.

15 MS. KAZLOW: Yes.

16 THE COURT: And then on the third point about
17 the deficiencies with regard to the plaintiff's
18 production, I am not authorizing full briefing on that
19 issue yet because I don't know the scope of the
20 defendant's complaint about what the deficiencies are.
21 So the defendant needs to file a letter with the Court
22 first setting forth the -- let me backtrack. That
23 process needs to go through my normal procedure of the
24 parties filing a joint letter on those deficiencies that
25 you can't resolve with regard to plaintiff's production

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1 and only after discussion by phone about that letter may
2 I possibly authorize a full briefing on issues such a
3 attorney-client privilege. And these relate to the
4 plaintiff's deficiencies, not the defendant's. All
5 right? So I think that gives us a plan for moving
6 forward.

7 MR. KORZENIK: Okay.

8 THE COURT: But I think I'll just go back to
9 what I said at the very beginning which is that the scope
10 of the discovery I authorized in September has not
11 changed. So keep that in mind.

12 MR. KORZENIK: Okay. Thank you very much, your
13 Honor.

14 THE COURT: All right.

15 MS. KAZLOW: Thank you.

16 THE COURT: I'm not going to put a deadline on
17 these matters because I would like the parties have time
18 to meet and confer and to discuss things but as far as
19 briefing of any motion on the reporters' privilege,
20 please work out a briefing schedule between the parties,
21 so that it's clear on who is filing what when. All
22 right?

23 MS. KAZLOW: Will do so. Thank you, your
24 Honor.

25 THE COURT: Great. Thank you, everybody.

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1 MR. KORZENIK: Thank you, your Honor.

2 MR. KEEGAN: Good. Thank you, your Honor.

3 MR. RUBENSTEIN: Thank you.

4 THE COURT: Okay.

5 (Matter Concluded)

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C E R T I F I C A T E

I, LINDA FERRARA, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 27th day of April 2021.


Linda Ferrara

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